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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK
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3 AKASH BUDHANI,

4 Plaintiff,

5 v.

20 Civ. 1409 (LJL)

6 MONSTER BEVERAGE COMPANY,
7 MONSTER ENERGY COMPANY,

8 **Oral Argument (Teleconference)**

9 Defendants.
-----x

10 New York, N.Y.
11 March 4, 2021
12 3:00 p.m.

Before:

13 HON. LEWIS J. LIMAN,

14 District Judge

15 APPEARANCES

16 SHEEHAN & ASSOCIATES, P.C.
17 Attorney for Plaintiff
BY: SPENCER SHEEHAN

18 SHOOK, HARDY & BACON LLP
19 Attorneys for Defendants
BY: NAOKI STEPHEN KANEKO
20 MARC PHILLIP MILES

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1 DEPUTY CLERK: Couple quick things before Judge Liman
2 gets on. First, this is a public proceeding, and members of
3 the public and press are able to access this proceeding through
4 the public dial-in number that's posted on the docket. So
5 everyone on the line is reminded that any recording or
6 rebroadcasting of any portion of this proceeding is strictly
7 prohibited.

8 Second, I'm just going to remind counsel: Any counsel
9 that won't be speaking on this call, please keep your phones
10 muted. Anyone who's on the line that also won't be speaking on
11 this call, please keep your phones muted to avoid background
12 noise. Counsel that will be speaking, I'm going to ask that
13 when you're not speaking that you keep your phone muted, and
14 then you begin speaking, to, of course, unmute your phone and
15 identify yourself each time for the benefit of the Court and
16 the court reporter. And just remember to speak as loudly and
17 clearly and slowly as possible. Thank you. Judge Liman will
18 be on in just a moment.

19 THE COURT: Good afternoon. This is Judge Liman.

20 Are we ready to get started?

21 DEPUTY CLERK: Yes, Judge. We're all set.

22 THE COURT: Great.

23 Who do I have on for the plaintiff?

24 MR. SHEEHAN: For the plaintiff, Spencer Sheehan,
25 Sheehan & Associates, P.C.

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1 Good afternoon, your Honor.

2 THE COURT: Good afternoon, Mr. Sheehan.

3 And for the defendant, Monster?

4 MR. KANEKO: Good afternoon, your Honor.

5 Naoki Kaneko from Shook, Hardy & Bacon, for defendant,
6 Monster.

7 MR. MILES: Good afternoon, your Honor.

8 Marc Miles, for defendant Monster as well.

9 THE COURT: Okay. I just need whoever's going to be
10 speaking for Monster.

11 Who's going to be speaking for Monster?

12 MR. KANEKO: I will, your Honor. Naoki Kaneko.

13 THE COURT: Okay, Mr. Kaneko.

14 So we're hear today for oral argument, the defendant's
15 motion to dismiss. I'm going to reiterate a couple of things
16 that my courtroom deputy said to you before we get started.

17 I will hear first from defense counsel as the moving
18 party, and then I'll hear from plaintiff's counsel, and then a
19 couple minutes at the end from defense counsel if there are any
20 last-minute thoughts. I've allocated an hour for today's
21 proceedings. So, defense counsel should keep that in mind to
22 maybe keep their opening remarks to about 15 or 20 minutes.
23 I've read the papers, so just highlight for me the most
24 important points.

25 Before you speak, identify yourself for the record.

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If you are not speaking, please put your phone on mute. Each side will have an opportunity to address the Court. Please try to speak loudly and clearly and slowly for the benefit of the court reporter. At the conclusion of today's proceeding, I'm going to ask defense counsel to stay on the phone and to order a copy of the transcript on an expedited basis. I do not expect to rule at the end of the day today, and the transcripts will be helpful to me in rendering a decision.

With that said, let me hear first from defense counsel, and then I'll hear from plaintiff's counsel.

MR. KANEKO: Thank you, your Honor. May it please the Court. Naoki Kaneko, for defendant, Monster Energy.

So, your Honor, this case, as you're well aware, is about the labels for Espresso Monster, which, as the name suggests, is a coffee beverage product. And it is sold in a can. And just for your reference, your Honor, there's a partial image of the label that is pasted in paragraph three of plaintiff's second amended complaint. But we've also attached a full color copy to our request for judicial notice that was filed concurrently with our motion.

THE COURT: Let me interrupt you for a moment on that.

Is there any objection from plaintiff's counsel to me taking judicial notice of that?

MR. SHEEHAN: No, your Honor. No objection.

THE COURT: Please proceed.

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1 MR. KANEKO: Thank you, your Honor. Again, Naoki
2 Kaneko, for defendant, Monster.

3 So looking at the front label of the can, which I
4 would emphasize is the only portion that plaintiff alleges he
5 relied on in purchasing the product, plaintiff has singled out
6 the words "vanilla cream" and an image of a flower while
7 essentially ignoring the rest of text and images. And he
8 claimed somehow that he was misled into believing that the
9 products vanilla flavor came exclusively -- actually in this
10 case predominantly from vanilla beans. On that label, if you
11 look front and center, is the name of the product, Espresso
12 Monster. Below that front and center is the Monster logo or
13 the Monster clause, as it's referred to. And then flanked on
14 both sides of the logo are the words "vanilla cream" on the
15 left and "triple shot" on the right. And then at the very
16 bottom of the label you'll see pictures of a flower which
17 plaintiff has identified as a vanilla flower along with some
18 espresso beans and a cup of coffee. But it's really the
19 vanilla cream statement along with the flower to a lesser
20 extent that plaintiff is relying on for his case.

21 Now, plaintiff claims the label -- his
22 interpretation -- is that it's false because, one, the product
23 isn't predominantly flavored by vanilla from vanilla beans.

24 THE COURT: Let me ask you, counsel, to assume that I
25 accept the allegations of the complaint, that there is only a

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1 trace amount of vanilla from vanilla beans in the product.

2 Would you confine your argument to what message you think a
3 reasonable consumer could get from the reference to vanilla on
4 the can and whether a consumer would assume that there is more
5 than a trace amount of vanilla from vanilla beans?

6 MR. KANEKO: Sure, your Honor.

7 That actually goes to the heart of the case. So
8 plaintiff is saying that he saw this vanilla cream
9 representation. And his interpretation was that the product
10 was predominantly flavored by vanilla beans. But that's really
11 not the reality of this. And this entire notion is really
12 belied by plaintiff's own prior pleadings in this case. I
13 mean, in his original complaint he alleges that only one to two
14 percent of vanillin in commercial use is vanillin obtained from
15 the vanilla plant, which means that almost all vanillin has no
16 connection to the vanilla beans. In other words, according to
17 plaintiff, what he's saying is that 98 percent of commercial
18 vanillin does not actually come from vanilla extract. And so
19 this really undermines --

20 THE COURT: Is that an understanding that a reasonable
21 -- I should find that a reasonable consumer would have? And
22 aren't you -- I understand your argument, but it seems to me
23 you're trying to have it both ways on that particular point,
24 holding a reasonable consumer to that bit of knowledge while
25 depriving the reasonable consumer of knowledge of the FDA's

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1 regulations. But both seem to me to be bits of information
2 that I should not assume a reasonable consumer has.

3 MR. KANEKO: Well, this situation, your Honor -- and
4 this is something that the other courts have addressed. But
5 the reality -- you're looking at -- when consumers see this
6 product, they're buying a -- remember, it's not just a can of
7 vanilla. We're talking about an espresso, cream and
8 vanilla-flavored product. And so for vanilla here, we're not
9 talking about an ingredient claim. There's no statement on the
10 can that's -- there's no representation for the reasonable
11 consumer as to what the source of that vanilla is. What they
12 are looking at on this product --

13 THE COURT: How do you address the flower? Doesn't
14 that convey the vanilla bean used as an ingredient just as a
15 picture of a blueberry on packaging for a blueberry muffin
16 would, or a pride of honey or Honey Graham crackers?

17 MR. KANEKO: I think there's a big difference there,
18 your Honor. You're talking about a vanilla flower. In all
19 honesty, when I saw the flower, I didn't even realize it was a
20 vanilla flower. But when you're talking about a blueberry and
21 a muffin, I mean these are things that you can see. And
22 blueberries, I think -- I mean, there's a case right on point
23 on that issue, where blueberry is more of an ingredient claim.
24 And the distinction here is when you're talking about vanilla,
25 the label doesn't say "vanilla beans." It doesn't say "vanilla

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1 extract." It doesn't say "real vanilla" anywhere on this
2 label. It says "vanilla cream." And so we're really dealing
3 with a flavor versus an actual explicit ingredient claim. When
4 you're talking about Graham crackers or an example like
5 blueberries, you know, those types of things are -- there's a
6 big difference between an ingredient as opposed to here, where
7 we're talking about just the flavoring. And so when we're
8 talking about flavoring --

9 THE COURT: Counsel, aren't you asking me in that
10 argument to assume the conclusion that you want me to draw?
11 Can you argue for me why I shouldn't understand from the flower
12 that a reasonable consumer would believe that real vanilla was
13 an ingredient?

14 MR. KANEKO: Well, your Honor, the fact is there is
15 real vanilla in this product. And plaintiff -- there's no
16 dispute there. Plaintiff is conceding that. Obviously he's
17 complaining that there's a de minimis level of vanilla in
18 there. But the question then is -- there's real vanilla in
19 there, which, based on the allegation of his own complaint that
20 most commercial vanilla isn't sourced directly from real
21 vanilla beans, I mean, it makes sense that there are going to
22 be -- there are simply other ingredients. There are a lot of
23 different sources of natural vanilla flavor. And that's
24 something that Judge Stanton highlighted in his Steele
25 complaint. I mean, the idea that -- the expectation that

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1 vanilla favoring comes exclusively from vanilla beans, that's
2 just not the reality of the situation. And plaintiff's own
3 complaint confirms that.

4 THE COURT: Okay. Continue.

5 MR. KANEKO: So, again, as I mentioned, your Honor,
6 the fact is there's no representation here about vanilla beans,
7 vanilla extract, real vanilla in the product. All we're
8 looking at is a product that states "vanilla cream" on there.
9 And that's precisely what was sold, that's precisely what was
10 received. Plaintiff doesn't allege that the product doesn't
11 taste like vanilla. In fact, he even says he liked the taste
12 and that he liked it for its intended use. And that's right
13 there in his complaint.

14 So, simply put --

15 THE COURT: Let me ask you. The depiction of the
16 coffee bean on the can, wouldn't a reasonable consumer
17 understand that the coffee flavor in this -- and the coffee
18 affecting this product comes from a coffee bean?

19 MR. KANEKO: I think that's right, your Honor. I
20 mean, there's coffee in the product. There is coffee
21 represented. It's Espresso Monster. So, yes, that's perfectly
22 reasonable.

23 THE COURT: So if that is so and the bean connotes to
24 a reasonable consumer that inside this can there's something
25 that comes from that bean, wouldn't a reasonable consumer think

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1 that within this can there's something more than trace amounts
2 that come from the bean that's attached to that flower?

3 MR. KANEKO: I think there's a distinction,
4 your Honor, between what we're talking about, the product here.
5 And the product here, remember, it's Espresso Monster. It's a
6 coffee product. I mean, if you look at the -- for example, the
7 beans, the cup of coffee in the images that you see at the
8 bottom of that can. And I would also direct you to the romance
9 language on the left side. Now, obviously the plaintiffs here
10 aren't focused on the side of the can, but I mean if you look
11 at the romance language itself, I mean it refers to: We like
12 the idea so much, we traveled to Europe to create our latest
13 coffee, Espresso Monster. Three shots of espresso blended with
14 milk and enhanced with Monster's espresso energy blend.

15 There's no references to vanilla there, your Honor.
16 So I think it's perfectly reasonable for a consumer to buy this
17 product and expect there to be more than just a de minimis
18 level of coffee, whereas here we're talking about a flavoring,
19 the vanilla cream here, I just don't -- I think there's a big
20 distinction there, your Honor.

21 THE COURT: Isn't that the same thing that you're
22 saying to me is the primary ingredient argument that's been
23 rejected by a number of judges, including Judge Cogan
24 (phonetic) and Judge Woods, that, you know, because vanilla is
25 not the primary ingredient here, your client would be free to

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1 lie about it?

2 MR. KANEKO: I wouldn't say we were free to lie about
3 it, your Honor. And the fact is, it's a true and accurate
4 statement. There's no disagreement here that the product does
5 contain some vanilla extract or real vanilla from vanilla
6 beans. The question here is that plaintiff is attaching this
7 added meaning that somehow vanilla cream means that the product
8 is exclusively flavored by vanilla beans. And that's not
9 indicated or supported by anything else on the label.

10 THE COURT: I mean, I'll hear in a moment from
11 plaintiff, but I understood a portion of their claim to be that
12 it's misleading to have just a trace amount of vanilla from
13 real vanilla beans if you're conveying the message that the
14 vanilla comes from real vanilla beans.

15 MR. KANEKO: Your Honor, I don't think --

16 THE COURT: Am I mistaken?

17 MR. KANEKO: Well, I would just correct you there in
18 the sense that there is no message that the product is
19 conveying that there's actual real vanilla beans in there.
20 Again, this is really just about a flavoring claim. And so,
21 when reasonable consumers see this product -- and this has
22 been, again, looked at by many of the judges in this district
23 -- they've --

24 THE COURT: I mean, you keep on saying that, but your
25 product is the only one that has the flower. So it's more

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1 helpful to me if you address this on its merits rather than
2 just saying to me what other judges have done in cases that
3 don't involve the same facts as your case.

4 MR. KANEKO: So, your Honor -- and I apologize.

5 But in the *Pichardo* case -- Judge Caproni -- that case
6 also involved a vanilla flower on the product. And just so
7 we're on the same page, your Honor, that was a vanilla-flavored
8 protein beverage and it was labeled with the vanilla flower
9 vignette, along with the words "smooth vanilla." Very similar
10 to the claims that we're dealing with here.

11 THE COURT: Okay. And how did you deal with the
12 flower?

13 MR. KANEKO: Well, your Honor, essentially it's
14 treated the same way. I mean, when you look at the product,
15 it's a vanilla protein beverage. And the flower really, it's
16 the same thing. It conveys a flavoring. And there was no
17 dispute, again, that the product actually contained some
18 vanilla. Now, the amount in question, obviously plaintiffs
19 were complaining it was a de minimis amount. But, again, when
20 you look at the label, there's nothing in the label itself that
21 conveys what amount of vanilla from vanilla beans is actually
22 in the product.

23 THE COURT: All right. Why don't you wrap it up, and
24 then I'll hear from your adversary.

25 MR. KANEKO: Now, there is an issue with the

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1 artificial flavors in the product. And plaintiff claims that
2 this product should have disclosed the presence of artificial
3 flavors. This should be rejected for several reasons. First,
4 the whole case is premised on the front label of the product.
5 Again, there's nothing on the front label that addresses, you
6 know, whether the ingredients are naturally or artificially
7 sourced. Now, it is true that the ingredients list identifies
8 natural flavors. But, again, plaintiff doesn't say he relied
9 on that.

10 But regardless, the entire basis of the claim that the
11 product contains artificial flavors is this purported GC-MS
12 testing. Now, your Honor's familiar with our brief. We've
13 highlighted the slew of issues with the testing. Oddly enough,
14 you know, that testing was -- in the other complaints that
15 we've seen, plaintiff did attach those results, but for some
16 reason, those test results weren't attached here. So we have
17 no ability to attack what was done in underlying procedures.
18 But the reality is the conclusion, even if you accept all of
19 these allegations and the findings from the test results, that
20 there was this added vanillin, that there was Maltol, and that
21 there was Piperonal. And, your Honor, there's a leap in logic
22 there where, even if you assume that those components were
23 found in the product, plaintiff just jumps over and concludes
24 that those things were sourced artificially, when his own
25 allegations -- cited in the complaint -- all of those confirm

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1 that these things can be sourced naturally. And there's no
2 analysis, no support suggested for plaintiff to get to that
3 conclusion, that these things are automatically artificial.
4 And for that reason as well, that should be rejected.

5 So I'll stop there, your Honor. And I would obviously
6 like to reserve some time to address your Honor's questions and
7 respond to Mr. Sheehan.

8 THE COURT: Okay. Mr. Sheehan, I'll hear from you.

9 MR. SHEEHAN: Spencer Sheehan, for the plaintiff.

10 Thank you, your Honor.

11 And thank you, Mr. Kaneko.

12 As the plaintiff, we don't have much to say because we
13 believe that the amended complaint and the opposition to
14 defendant's motion succinctly describe the issues here. This
15 case does involve a picture of a vanilla bean and the vanilla
16 flower on the front of the label, which plaintiff alleges
17 causes consumers to believe the product contains a non-de
18 minimis amount of vanilla.

19 The second thing in addition to the allegations that
20 the product allegedly does not contain much vanilla is that it
21 also contains the exact opposite, artificial vanilla.

22 Defendant has stated in its brief and in its argument today
23 that there's no representation -- excuse me if I'm paraphrasing
24 incorrectly -- but that the front label makes no representation
25 beyond the words "vanilla" and the "vanilla bean." But that

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1 specific absence or omission of representation of the
2 artificial flavors that the amended complaint alleges are, in
3 fact, a representation, because the presence of artificial
4 flavors is something that consumers are entitled to know about
5 when they buy a product, and it's why many products, when we go
6 to the store, they'll have -- maybe in small letters it will
7 say "artificially flavored." Or it might even say "with other
8 natural flavors" or just "naturally flavored." Here, we have
9 no --

10 THE COURT: Counsel, is it your contention that
11 whenever a company advertises that its product is flavored a
12 particular way -- mint-flavored chewing gum -- that if that
13 flavor is derived artificially, it has to use the word
14 "artificial"?

15 MR. SHEEHAN: Mint-flavored chewing gum that's
16 flavored with mint? No, that does not have to use --

17 THE COURT: No. I understand that. But my question
18 to you is whether any time a company describes a flavor, it
19 also has to add whether that flavor is artificial, if it is in
20 fact artificial.

21 MR. SHEEHAN: Yes, your Honor. That is my
22 understanding of the requirements.

23 THE COURT: Maybe for the FDA. But to a reasonable
24 consumer?

25 MR. SHEEHAN: Well, your Honor, I think that whether

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1 or not, you know, the consumers want to consume artificial
2 flavors -- now maybe in the context of a gum, that might be
3 different, but as the amended complaint alleges, many consumers
4 in increasing number seek to avoid artificial flavors. So I
5 guess --

6 THE COURT: I can understand that if, for example, you
7 had a smoothie and you said as to the smoothie that it's a
8 blueberry, banana, peach smoothie, that a consumer might,
9 seeing the word "blueberry," understands that that is natural
10 blueberry.

11 But with an energy drink, can you say the same thing,
12 and why would you say the same thing?

13 MR. SHEEHAN: Thank you, your Honor.

14 Well, your Honor is correct in pointing out potential
15 distinctions between a smoothie made with fruits and natural
16 fruits and an energy drink. However, this is not an energy
17 drink that is like the typical energy drinks that, you know,
18 defendant might make. Oftentimes we think of an energy drink
19 we think of -- at least I think of a Red Bull drink, which has
20 a sort of medicinal type taste, that's syrupy. Here, this is
21 an energy drink that is based on coffee, which is not some
22 laboratory concoction of a typical energy drink. It's coffee,
23 espresso, and vanilla cream as the characterizing flavor.

24 So in the context of energy drinks, if this was, let's
25 say one of these other energy drinks that are out there -- and

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even the ones that defendant makes, that have sort of fanciful names and, you know, descriptions and color patterns that sort of are really not connected to any actual ingredients, this is a more subdued product, which I think is part of the reason for its success because it's based on coffee, which is something that, you know, consumers are familiar with. It's not based on a chemical cocktail or, you know, a mix of syrups and pumped with caffeine. So I think that there's somewhat of a distinction there, although your Honor makes a good point.

THE COURT: So, why would it be important from your perspective for a reasonable consumer to know that there are small amounts of vanilla from vanilla bean and that much of the flavor comes from other sources? And let's assume that it's from artificial sources.

MR. SHEEHAN: The plaintiff --

THE COURT: Because of the medicinal value of vanilla from the vanilla beans? Or why does anybody care?

MR. SHEEHAN: Thank you, your Honor.

It's because, one, vanilla tastes different than the artificial vanilla flavor replacements; two, it's because, as the amended complaint alleges, the product is sold for a higher price because it does not disclose the presence of artificial flavors; and, three, people care because they want to get what they're promised. And I understand some people might not care, but the amended complaint alleges that it's material. And, of

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1 course, your Honor is free, you know, to -- or any court is
2 free to decide that it's not material. So I mean, the
3 plaintiff can only argue that it was material to the plaintiff
4 and believes it's something material to consumers.

5 THE COURT: Did you allege in your complaint that,
6 from the plaintiff's perspective, the flavor was worse or that
7 the reasonable consumer was deceived as to flavor?

8 MR. SHEEHAN: That they were deceived?

9 THE COURT: That they were deceived as to flavor.

10 MR. SHEEHAN: Right. I understand.

11 That may not be in the complaint, your Honor, so I
12 understand the Court's reluctance to consider that, although I
13 would say that it is something -- I don't want to say
14 self-explanatory that vanilla is different than artificial
15 vanilla, but I don't see that argument specifically made in
16 this complaint. I don't want to hold the Court up while I look
17 through it, so --

18 THE COURT: Let me ask you another question about the
19 can.

20 MR. SHEEHAN: Sure.

21 THE COURT: There's a picture on the can of what looks
22 like a cup of hot coffee. Is it your contention that a
23 reasonable consumer would think that within this can there is a
24 cup of hot coffee?

25 MR. SHEEHAN: Your Honor, a reasonable consumer would

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1 purchase this item from a cooler or, you know, a refrigerator,
2 so I don't know how it's possible. I think it's clear that the
3 product is described as "espresso triple shot." And whether or
4 not that is, in fact, a cup of coffee on the front or what
5 looks to be perhaps a mini espresso shot -- I know the product
6 talks with the romantic language that opposing counsel
7 described -- I believe then that that cup would be a cup of
8 espresso, and the fact that the product is purchased, they're
9 removed from a refrigerator, should dispel. I don't know who
10 would think something coming from a refrigerator would be a cup
11 of hot coffee. It's cold. The beverage is cold when you buy
12 it because it's refrigerated.

13 THE COURT: Okay. So then if that's the case, isn't
14 it reasonable to assume -- isn't the only reasonable inference
15 from the pictures that what they are trying to convey is the
16 effect that this drink will have on somebody, and not literally
17 to convey that there is a cup of coffee or a cup of espresso
18 inside with, you know, real vanilla and real coffee beans?
19 It's just trying to convey that this is going to give you the
20 energy and have the effect -- a Monster effect -- of drinking a
21 triple espresso.

22 MR. SHEEHAN: Thank you, your Honor.

23 Those are good points. Plaintiff and I would say --

24 THE COURT: But if I accept them, aren't they fatal to
25 you?

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1 MR. SHEEHAN: If your Honor accepts that the product
2 does not contain espresso. But I would say that the product
3 does contain espresso because I know it does from looking at
4 the ingredient list where it says "brewed imported espresso
5 coffee." I think that, you know, espresso as a type of coffee,
6 I guess, and it's a highly concentrated kind. And the product
7 does contain espresso, which is true to the front of the label
8 and the picture of the espresso cup. And it would also hold
9 that the product would contain enough vanilla. The product
10 ingredient list also says "cream." So there's cream. So
11 that's a reasonable assumption. But this case is about the
12 presence of vanilla and, you know, where the product has real
13 espresso, where it has real cream, enough that it doesn't need
14 to be supplemented with other ingredients, the plaintiff
15 alleges the product should have real vanilla, at least enough
16 to impart, you know, vanilla character to the product and not
17 have artificial flavors to produce the vanilla taste.

18 THE COURT: Okay. Why don't you go on with the rest
19 of your argument.

20 MR. SHEEHAN: Okay. Thank you.

21 Well, there were a couple of other points that I wish
22 to address. First is the artificial flavors, the Maltol
23 Piperonal. Defendant is correct that the testing results and
24 inferences don't prove that these ingredients -- or these
25 components are artificial. We do rely on FDA regulations that

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1 describe these flavored compounds as artificial. However, at
2 the pleading stage, without discovery, we believe that we've
3 met the burden of going forward with the claim that these are
4 artificial flavors. If defendant wanted to, it could have
5 submitted declarations or affidavits about the source of these
6 other flavors.

7 One other thing. Defendant stated that the product
8 contains real vanilla, that even if, as plaintiff alleges, it's
9 a de minimis amount, it's still not misleading. Plaintiff
10 relies on *Mantikas v. Kellogg* and believes that the presence of
11 a small amount of an ingredient in a product is not sufficient
12 to overcome otherwise misleading front-label claims.

13 The last thing is the case in *Pichardo v. OWUN*. It is
14 correct, as defendant noted, that this case came to a different
15 conclusion. Are there reasons for that? Is there some
16 explanation that I can give the Court why somehow this case
17 should be different? I don't think so. You know, cases are
18 different. Not all are the same. We try to find the common
19 principles and threads through each one, being respectful, of
20 course, always of the judicial process and the courts. But I
21 really don't have much to add about that, although I think that
22 the fact that, while the OWUN beverage was a smoothie, it did
23 not have sort of as natural a character as this product does.
24 That product was I think, you know, some sort of non-dairy
25 protein beverage, whereas, you know, this is clearly a -- you

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1 know, mostly -- or expected to be a natural product. It's --

2 THE COURT: Where do I see that in your complaint? I
3 agree that if a reasonable consumer could understand this to be
4 a natural product, that would help your cause. But tell me
5 where I get that from, because looking at the can, one could
6 assume that this is a completely artificial product intended
7 just to give somebody a caffeine high.

8 MR. SHEEHAN: Your Honor makes an excellent point.
9 You know, I guess --

10 THE COURT: Help me with -- I mean, you said to me
11 that a consumer would understand this as a natural product. If
12 that's in your complaint, I'd like to know it, because it's --
13 it may make a difference.

14 MR. SHEEHAN: That is correct, your Honor. And I'm
15 not going to tell the Court that it's there specifically. I'm
16 going to take a look. You know, I don't really -- at least I
17 don't recall that argument being in there. So, you know,
18 that's maybe something that wasn't pleaded at the time. But
19 that's obviously -- you know, maybe it wasn't something that
20 was considered and that was a -- I guess it was not expected
21 that that would be relevant. And to the extent that your Honor
22 would grant defendant's motion, we would request a leave of
23 Court to add those other allegations, of course, to the extent
24 that would even be worthwhile. We think it would. It is
25 something that I believe the material. And I wish I could

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1 think of everything. And even though it's just one can,
2 there's just so much you think that you can get out of it. And
3 I guess, we have to think a little bit wider and broader.

4 THE COURT: I can tell both parties that I've spent a
5 fair amount of time trying to study the case.

6 All right. Mr. Sheehan, why don't you bring it to a
7 close, and then I'll turn back to your adversary if there's
8 anything else I should know.

9 MR. SHEEHAN: Thank you, your Honor.

10 And the last and final thing is that, you know, this
11 is a motion-to-dismiss stage. We're not, you know, at summary
12 judgment. There's been no evidence offered really. And it's
13 not something that has to be one way or the other. This is
14 something that, well, you know, could it mislead consumers?
15 And is that plausible? I think it's plausible. And whether or
16 not it's clear to us, as people who have studied this, whether
17 that would be misleading, it's a different story than the
18 standard that's applied on the motion-to-dismiss stage.

19 So that's all I have, your Honor. Thank you.

20 THE COURT: Well, let me ask you a couple of
21 questions.

22 Are you familiar with Judge Woods' decision in the
23 *Honey Graham crackers* case?

24 MR. SHEEHAN: Yes. That was a case I did, your Honor.

25 THE COURT: Okay. So you know that in that case he

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1 drew something of a distinction between honey where the honey
2 flavor is commonly known to really only come from natural honey
3 and vanilla -- or something other than honey, where the words
4 don't necessarily, in his view, and supported by the complaint,
5 connote a necessary ingredient.

6 How do you address that? I mean, isn't it the point
7 that when people see the word "vanilla," it is commonly
8 understood to be a flavor?

9 MR. SHEEHAN: Yes. Thank you.

10 And, you know, Judge Woods makes very accurate and
11 very good points, obviously. And I would say that, yes,
12 vanilla is understood to be a flavor. But where the vanilla is
13 presented with pictures of the vanilla bean, and without any
14 qualifying language such as "artificially flavored," that's
15 something that consumers are aware of. They look and they see
16 it doesn't say artificially flavored. They see the picture of
17 a vanilla bean and the vanilla flower. The fact that vanilla
18 is not technically a nutritive ingredient doesn't take away
19 from the fact that consumers are entitled and they want a
20 product that comes from the ingredient. It comes from the
21 vanilla bean, vanilla extract, and you know it is just as much
22 an ingredient as honey is an ingredient. The fact that its
23 caloric significance might be less because, yes, I agree it's a
24 flavoring. But it's also an ingredient. And I believe that
25 that is sufficient to distinguish this in addition to the

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1 absence of any disclosure that the product has artificial
2 vanilla flavor as opposed to natural vanilla flavor.

3 THE COURT: Okay. Let me turn to your adversary.
4 Thank you very much.

5 MR. SHEEHAN: Thank you.

6 MR. KANEKO: Thank you, your Honor. Naoki Kaneko
7 again for Monster.

8 THE COURT: Mr. Kaneko, let me ask you my questions
9 studying this can.

10 If it is correct that the product literally has
11 espresso in it -- that is, confirmed by the ingredient
12 list -- and if it's also correct, as I think you said before,
13 that it's got the equivalent of three shots of espresso, as
14 represented on the right side of the can where it says "triple
15 shot," and if it's also correct that it has cream in it, as
16 confirmed by the ingredient list, why isn't it plausible that a
17 reasonable consumer seeing the word "vanilla," seeing the
18 flower, seeing also the coffee beans, would understand that
19 it's got more than a de minimis amount of vanilla from the
20 vanilla bean?

21 MR. KANEKO: Well, again, your Honor, remember, this
22 is a coffee product. And so the only quantification in terms
23 of the descriptors that are being used here is the triple.
24 Yes, there's a triple shot here; there are three shots of
25 espresso. But from this label, there's no representation as to

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1 how much vanilla is in the product. Now --

2 THE COURT: But, come on. That argument is the
3 argument that was rejected in *Mantikas*. If this product
4 actually said "made with real vanilla" and there was just a
5 trace amount of vanilla, you wouldn't be standing in front of
6 me and saying the label is not misleading.

7 MR. KANEKO: Your Honor, that's correct. There's a
8 difference between saying "made with vanilla beans or vanilla
9 extract" as opposed to labeling this product as a "vanilla
10 cream coffee-flavored beverage."

11 THE COURT: That's my question, is it clearly can't be
12 the law that the use of the words "made with" are magic and
13 that you only understand an item to be an ingredient if the
14 words "made with" are included. That's the point that Judge
15 Woods was making when he showed the honey pot and the stick.
16 And my question to you is:

17 Why isn't a use of the flower, along with all the
18 other things on the can, equivalent to saying "made with" what
19 comes from that plant or the bean attached to that plant?

20 MR. KANEKO: Again, your Honor, I think the point is
21 that there is actually -- so in this situation, even if you had
22 "made with" -- "made with" isn't -- I used that because it's an
23 easy call, right. It's an easy call to say if something is
24 made with, then a reasonable consumer would expect that that
25 product had whatever you're representing it was made with. But

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1 even "made with" isn't all determinative, your Honor. When
2 you're thinking about -- for example, there's the *Sarr* case,
3 and those were mashed potatoes. And I think the allegation
4 there was -- analogizing to here, the claim there was that the
5 representation that those mashed potatoes were made with real
6 butter, that that somehow meant that there were no other fats
7 in the product. And the court said no, no, no, that's not
8 case. This thing has real butter in it. You can't add an
9 additional meaning to suggest that, well, okay, this thing has
10 made butter in it, that means it doesn't have any other fat.

11 I think the other example, there was the "made with
12 honey" case. I think it was the Kennedy case, where there was
13 a "made with honey" representation, and along the same lines,
14 the claim was, well, you said "made with honey," that meant
15 there were no other sweeteners in this product. And the court
16 said no. They rejected that claim as well and said no, this
17 thing was made with honey, it had some honey in there, there's
18 nothing about the label that suggests that it didn't have these
19 other sweeteners; likewise, it didn't have these other fats in
20 it.

21 And I think that's the distinction here, your Honor.
22 Here, we have -- I would agree, it's not necessarily "made
23 with" that defines the line, but it's that representation that
24 this product contains. Remember, it's the entire context of
25 the label here. When I walk into the store and I'm looking for

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1 -- in this case, your Honor mentioned it, it's a reasonable
2 consumer might be looking for maybe a coffee product, maybe an
3 energy drink. They're not looking for a can of vanilla, a can
4 that contains a hundred percent vanilla. They're looking for a
5 coffee product or an energy drink. And when they're
6 distinguishing between those flavors, here it's the vanilla
7 cream flavor that's standing out, not the representation that,
8 hey, this product has X amount of vanilla bean in it. It's:
9 Does it taste like vanilla? The plaintiff himself
10 acknowledges, yes, it does, it tastes like vanilla.

11 So a reasonable consumer who buys this product, gets
12 what they bargained for. They were looking for a coffee
13 vanilla-cream-flavored product. That's what they got. They
14 were looking for a product that was naturally flavored. The
15 ingredients are naturally flavored.

16 Now, just as an aside, your Honor, this notion about
17 the artificial ingredients, under the FDA regs, when a product
18 uses a descriptor of vanilla as the characterizing label, if
19 there are artificial flavors, then that vanilla representation
20 on the front would have to be accompanied by an artificial
21 disclaimer, "artificially flavored," or something along those
22 lines. But the reason that's not in there is because these
23 flavors are, in fact, natural. And so the labels do comply
24 with the FDA regs. This whole thing notion about, hey, these
25 things are artificial, plaintiff's counsel has acknowledged

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1 they don't know. It's all speculation. They have a test that
2 identified three components. They acknowledge here that the
3 components -- their complaint acknowledges it. The FDA regs
4 acknowledge it -- those things can't be sourced either
5 artificially or naturally. And they don't know. They just
6 make the leap and logic assumption that it is artificial, and
7 that's not enough. And the same exact testing, the same exact
8 logic was rejected in the last three cases in *Berreto*, *Wynn* and
9 *Twohig*. The exact same logic, the exact same testing was
10 cited, the exact same components at issue was cited. And the
11 courts rejected that because it was just speculation.

12 THE COURT: So, counsel, would your argument be the
13 same if this can actually said "made with real vanilla"?

14 MR. KANEKO: If it said "made with real vanilla," it
15 would be a different story, your Honor. Like I said, this
16 product does contain vanilla. The question then is: What does
17 that mean in terms of how much?

18 Again, though, in that situation, your Honor, I would
19 point back to the plaintiff's own allegation, that 98 percent
20 of commercial vanillin isn't sourced from natural vanillin.
21 And I think that's really the underlying issue here. They're
22 operating under this assumption that vanilla flavoring is
23 solely derived from vanilla beans. Yet, Judge Stanton pointed
24 out in the *Steele* case that natural vanilla or vanilla
25 flavoring is not just derived from vanilla beans. There are

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1 many, many different sources of natural vanilla flavoring. And
2 that's what we're dealing with here, your Honor. When you talk
3 about how much vanilla extract, it's really just -- it's the
4 assumption that's incorrect here. And their own pleadings
5 acknowledge that, your Honor, that 98 percent -- the reality is
6 the majority of vanilla flavoring isn't sourced from vanilla
7 beans. Here, though, we do have a product that does have some
8 vanilla bean extract in there. Plaintiff acknowledges it. And
9 it's also sourced with other natural flavors.

10 Now, again, this product is not just a can of vanilla.
11 We have espresso, we have cream. So those natural flavors, the
12 notion that it's just applicable to vanilla, you know, it can't
13 be looked at in that vacuum. He's ignoring the fact that,
14 okay, there's coffee in this product, there's cream, there's
15 sugar, there's other things in there. So natural flavoring, it
16 may not line up. And that's the whole point. With their
17 testing, they compared an Espresso Monster with a purported
18 sample of just pure vanilla extract. Well, they don't know --
19 that means they have no basis for knowing what should or
20 shouldn't be in Espresso Monster.

21 Again, I'm repeating myself, but one thing I would
22 point out is --

23 THE COURT: You are. Why don't you bring it to a
24 close.

25 MR. KANEKO: And so ultimately, your Honor, as we've

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1 addressed in our brief, the reality is if you find and you
2 agree with our position that, look, this is a flavoring claim,
3 there's no representation about how much vanilla bean was
4 actually in the product, there's no representation -- and then
5 you disregard the fact that there really is no artificial
6 flavors in there and all of the allegations to that effect are
7 based on pure speculation, then all of the claims should be
8 dismissed for those grounds.

9 Now, plaintiff can take an issue with the listing of
10 natural flavors on the ingredients list. You know, we
11 highlighted this issue in our brief. But the FDA regs, there's
12 nothing wrong with that, and they specifically allow for
13 companies, for food and beverage makers to identify natural
14 flavors as natural flavors without specifically identifying
15 every single flavoring source. Now, plaintiffs are asking and
16 suggesting that that's what Monster is required to do, and
17 that's not the law. And so to that extent, those claims should
18 be preempted.

19 Now, there's a whole slew of common law claims.
20 Again, those can be dismissed for the same reasons the GBL
21 claims are dismissed. But I'm happy to address any
22 deficiencies. We've highlighted those in our brief. And with
23 that, I'll submit, your Honor.

24 THE COURT: All right. The argument's been very
25 helpful. Thank you to both of you.

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1 Defense counsel, why don't you stay on the phone and
2 order a copy of the transcript on an expedited basis. The
3 Court will take it under submission. And I'll get back to you
4 as soon as I can with a decision. Thank you.

5 MR. KANEKO: Thank you, your Honor.

6 MR. SHEEHAN: Thank you, your Honor.

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